

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Altrio Communications)	CSR-6229-A
Petition for Special Relief)	
)	
)	
KVMD Licensee Co., LLC)	
Complaint for Carriage)	CSR-6206-M
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 2003

Released: November 14, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KVMD Licensee Co., LLC (“KVMD” or “Station”), permittee of Station KVMD-DT, Twentynine Palms, California (Ch. 23-Ind.), has filed a Complaint against Altrio Communications (“Altrio”) because of the cable operator’s refusal to carry the station’s digital television signal on its system. Altrio filed an Opposition to the Complaint and KVMD filed a Reply.

2. Altrio filed a Petition, pursuant to Section 76.7 of the Commission’s rules and Section 614(h) of the Communications Act (“Act”),¹ seeking to exclude certain communities from KVMD’s market so that it would be under no obligation to carry the Station’s signal on its system.² KVMD filed an Opposition to the Petition and Altrio filed a Reply. We jointly consider the Complaint and the Petition because they are interrelated.

II. BACKGROUND

3. Pursuant to Section 614 of the Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* (“*Must Carry Order*”), commercial television broadcast stations are entitled to

¹ 47 U.S.C. § 614(h)(1)(c). Altrio’s Petition for Special Relief was also filed as the operator’s Opposition to KVMD’s must carry complaint.

² The specific Altrio cable communities at issue are: (1) Arcadia; (2) Monrovia; (3) Pasadena; (4) Los Angeles County; (5) Area D of the City of Los Angeles; (6) Sierra Madre; and (7) Temple City. These communities are served from a single cable headend and are located northeast of downtown Los Angeles. Altrio operates as an open video systems operator (“OVS”) in some of these communities.

assert mandatory carriage rights on cable systems located within the station's market.³ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.⁴ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Each county in the United States is assigned to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁵

4. Under the Act, however, the Commission is directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

... with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁶

In considering such requests, the 1992 Cable Act provides that:

... the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or system within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or system in such community.⁷

The legislative history of the provision states that:

³8 FCC Rcd 2965, 2976-2977 (1993).

⁴Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); see *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁵For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁶47 U.S.C. § 534(h)(1)(C).

⁷*Id.*

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁸

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁹

5. In the *Market Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.¹⁰

(C) Available data on shopping and labor patterns in the local

⁸H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁹*Must Carry Order*, 8 FCC Rcd at 2977 n.139.

¹⁰The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

market.

(D) Television station programming information derived from station logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹¹

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be refiled at a later date with the appropriate filing fee. The *Market Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

6. In *Carriage of Digital Television Broadcast Signals* (“DTV Must Carry Report and Order”), the Commission concluded that under Section 614(a) of the Act, a digital-only television station has mandatory carriage rights, and amended the rules accordingly.¹² The Commission has established a framework for analyzing market modifications for digital television stations.¹³ The Commission stated that Nielsen’s market designations, publications, and assignments for the analog television market should continue to be binding on broadcast stations transitioning to digital television broadcasting. The presumption is that the market of the station’s digital signal is coterminous with the station’s market area for its analog signal during the transition period.¹⁴ The Commission also found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, will be applicable to digital television modification petitions during the transition period when television stations broadcast both an analog signal and a digital signal.¹⁵ The Commission recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, the Commission stated that it would take into consideration changes in signal strength and technical

¹¹47 C.F.R. § 76.59(b).

¹²See 16 FCC Rcd 2598, 2606 (2001); 47 C.F.R. § 76.64(f)(4). The Commission has held that a television station may elect to have its digital signal carried in an analog format by local cable systems. The Commission concluded that for purposes of supporting the conversion to digital signals and facilitating the return of the analog spectrum, a television station may demand that one of its high definition digital (“HDTV”) or standard definition digital (“SDTV”) television signals be carried on the cable system for delivery to subscribers in an analog format. *DTV Must Carry Report and Order*, 16 FCC Rcd at 2630.

¹³See *id.* at 2635-36.

¹⁴We note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station’s digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. See *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997).

¹⁵See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

coverage because of new digital television channel assignments and power limits. It concluded that all other matters concerning the modification process for digital television signals will be decided on a case-by-case basis.¹⁶

III. DISCUSSION

7. KVMD states that it is an authorized full service digital UHF station whose city of license is Twentynine Palms, California, a community located in San Bernadino County, California.¹⁷ KVMD further states that its DTV facility is authorized to broadcast on Channel 23 and commenced operations, pursuant to special temporary authority, on July 29, 2002. KVMD adds that on June 1, 2003, it discontinued analog operations, and commenced digital-only operations, pursuant to Commission authorization.¹⁸ KVMD states that the Station and Altrio's system are both located in the Los Angeles DMA. KVMD states that by certified letters dated May 5, 2003, it elected and sought mandatory carriage on Altrio's system. The Station asserts that Altrio did not respond directly to KVMD's correspondence, and therefore, filed its complaint against the operator. On August 4, 2003, Altrio filed a Petition for Special Relief seeking modification of KVMD's market. Altrio's market modification arguments are set forth below.

8. **History of carriage.** Altrio asserts that KVMD's digital signal has no history of carriage on its system.¹⁹ Altrio notes that KVMD's analog signal also did not have a history of carriage despite being on-the-air for a period of nearly five years. In its response, KVMD asserts that, being a new television station, it has not had the opportunity to build a history of carriage on Altrio's system. The Station also asserts that Adelphia Communications and Charter Communications have "understandings" with KVMD to carry its signal on their respective cable systems in the Los Angeles DMA.²⁰ According to KVMD, Adelphia and Charter serve communities close in geographic proximity to Altrio's communities. Altrio argues that whatever understanding as may exist between KVMD and Adelphia or Charter, those understandings are for future, not historic, carriage and cannot be used to demonstrate fulfillment of the first statutory market modification factor.²¹ With regard to the KVMD-Adelphia agreement, Altrio states that carriage by the latter was expressly made in exchange for the Station's forbearance in filing a carriage complaint.²² Altrio suggests that this reflects carriage through compulsion, and not an acknowledgement between the cable company and the Station that KVMD has a local nexus to the cable communities.

9. **Local Service.** Altrio asserts that KVMD fails to provide any coverage or local service to the Altrio communities.²³ Altrio provides evidence showing that its communities are between 109 and 126

¹⁶ *Id.*

¹⁷ Twentynine Palms is on the eastern edge of the Los Angeles DMA.

¹⁸ KVMD Must Carry Complaint at 2, citing *KVMD(TV), Twentynine Palms, CA*, DA 03-1481 (rel. May 1, 2003).

¹⁹ Petition at 5.

²⁰ Opposition to Petition for Special Relief at 7. KVMD notes that Adelphia currently carries the Station on ten of its systems, and has agreed to carry the Station on substantially all of its systems by November 2003. See Exhibit C attached to KVMD's Opposition to Petition for Special Relief.

²¹ Reply at 7.

²² *Id.* at 8.

²³ Petition at 5.

miles from Twentynine Palms.²⁴ Altrio states that desert, mountain ranges, and forests separate its communities from the Station's City of License. Altrio notes that Twentynine Palms is considerably closer to the State of Arizona than to any part of its franchise area. Altrio asserts that these facts support the conclusion that there is no economic or business nexus between KVMD and the communities. With regard to technical service coverage, Altrio asserts that the Station's digital coverage area falls short of its communities by at least 16 miles.

10. In response, KVMD concedes that the Station fails to satisfy the 41 dBu technical coverage requirement and further concedes that the Station is located over 100 miles from the Altrio communities.²⁵ KVMD argues, however, that analog-based contour and distance concepts are poorly suited to the propagation of digital signals which are subject to the "cliff effect."²⁶ KVMD urges the Commission to replace contour and distance standards with a good quality signal rule. According to KVMD, if a digital station is able to deliver a good quality signal to the operator's headend by any means, it should qualify for carriage.²⁷

11. Altrio asserts that KVMD does not broadcast local programming with a distinct nexus to any of the cable communities.²⁸ Altrio states that KVMD airs general interest and paid programming provided by the America One network.²⁹ KVMD counters that its programming has a "distinct nexus" to the cable communities at issue. It asserts that it carries a substantial amount of programming about horses and that there are many horse enthusiasts throughout the Los Angeles DMA.³⁰ KVMD also states that it carries informational and "inspirational" local programming such as "Working Wardrobe" and "This Week in Garden Grove" for viewers in Garden Grove as well as "City Beat" for viewers in Pasadena and "Inland Empire Alive" for people living in San Bernadino and Riverside Counties.³¹ KVMD adds that it expects to air new locally produced news, sports, and foreign language programs directed at viewers in San Bernadino, Riverside, Orange, and Los Angeles Counties.³² Altrio asserts that KVMD has not provided sufficient evidence in the record to support its claim that the Station's programming serves the interests of viewers in the cable communities.³³

12. **Carriage of other local television stations.** Altrio asserts that it carries other Los Angeles DMA television stations that cover news, sporting events, and issues of concern to the

²⁴ *Id.* at 6.

²⁵ Opposition to Petition for Special Relief at 8.

²⁶ *Id.* at 11. The Commission has explained the cliff effect in its *DTV Must Carry Report and Order*. If a digital signal is received, a good quality picture can be constructed at the television receiver; however, once the signal falls below a minimum signal threshold, no picture can be reconstructed or displayed by the television receiver. See 16 FCC Rcd at 2617 n.131

²⁷ Opposition to Petition for Special Relief at 10.

²⁸ Petition at 7.

²⁹ *Id.*

³⁰ Opposition to Petition for Special Relief at 11-12.

³¹ *Id.*

³² *Id.*

³³ Reply at 5. Altrio states that it carries "City Beat" on its public access channel carried on the system.

communities.³⁴ KVMD states that Altrio has made no showing that it currently carries any broadcast television station that offers the unique programming provided by KVMD, or that promises to deliver the multicultural news and community interest stories that the Station plans to offer in the near future.³⁵

13. **Viewing patterns.** Altrio asserts that there is no evidence of viewership of KVMD in either cabled or non-cabled households in the cable communities.³⁶ Altrio adds that neither the Los Angeles edition of the *TV Guide* circulated by the *Los Angeles Times* nor the equivalent schedule publication of the *Los Angeles Daily News* provides programming information for the Station. KVMD argues that it should be treated as a new station for market modification purposes because it is under new ownership and because it is a new digital-only station.³⁷ Based on these facts, KVMD states that viewership levels should not be accorded substantial weight in this proceeding.

14. **Other factors.** Altrio argues that affording special treatment to KVMD, because its digital-only status, would violate the Communications Act and the Commission's market modification regulations.³⁸ Altrio argues that KVMD wants to abandon its local service area and become a Los Angeles station.³⁹ To prove its point, Altrio asserts that KVMD has oriented its digital transmitter, which is 43 miles west of Twentynine Palms, so that it is directed toward Los Angeles and San Diego. Altrio argues that KVMD's must carry requests are antithetical to the principle of localism that girds the foundation of the mandatory carriage regime.⁴⁰ KVMD argues that extensive cable carriage of digital stations is necessary to spur consumer interest and participation in the digital television transition.⁴¹ Altrio, in its Reply, argues that KVMD's policy arguments should be broached in a rulemaking of general application and not within a market modification proceeding involving specific facts and parties.⁴²

15. Section 614(h)(1)(C) of the Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market.⁴³ Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account.⁴⁴ These principles apply to all television stations without regard to the mode in which the station broadcasts. KVMD urges us to adopt a new paradigm for market modification cases involving digital television stations. It asks us to abandon precedent and order a cable operator to carry a digital television signal if a subject television station promises to provide a good quality signal to the cable system's principal headend. KVMD's proposal is directly contrary to Section 614(h). As Altrio argues, KVMD's

³⁴ Petition at 8.

³⁵ Opposition to Petition for Special Relief at 14.

³⁶ Petition at 9.

³⁷ Opposition to Petition for Special Relief at 15.

³⁸ Petition at 10.

³⁹ *Id.* at 12.

⁴⁰ *Id.*

⁴¹ Opposition to Petition for Special Relief at 18.

⁴² Reply at 3.

⁴³ 47 U.S.C. § 534(h)(1)(C).

⁴⁴ 47 U.S.C. § 534(h)(1)(C)(i).

proposal would violate Section 614(h) and the Commission's implementing rules.

16. Furthermore, the Commission has found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, are applicable to digital television modification proceedings during the transition period.⁴⁵ KVMD's proposal ignores the directives the Commission established over two years ago. KVMD did not petition the Commission to reconsider its conclusions on the application of Section 614(h) to digital television stations. It is inappropriate for KVMD to attempt to do so here, or in other market modification proceedings.

17. Altrio has presented evidence in the record to support its request. In this matter, KVMD has no history of carriage and no discernable viewership in the communities at issue. The record evidence also indicates that KVMD's analog signal, when it was broadcasting, was not carried and did not have viewership in the communities. Although KVMD claims to have carriage "understandings" in place with Adelphia and Charter, and the former apparently is carrying the Station on certain systems, there is no clear indication in the record as to where or under which circumstances such carriage would commence. It is also evident that KVMD is geographically distant from the communities, that its digital coverage area falls short of the cable communities, and that the Station is separated from the communities by mountain ranges, deserts, forests, and political boundaries. KVMD has also failed to rebut Altrio's showing with sufficient evidence that it airs a substantial amount of programming with a distinct nexus to the communities. Moreover, although the Station has indicated that it plans to provide locally oriented programming in the future, we cannot base our decision on future programming plans. Altrio has shown, however, that there are numerous local television stations that it currently carries that provide specific programming of interest to the communities.⁴⁶ In conclusion, relying on case precedent for analog television station market modifications, the grant of Altrio's market modification request would effectuate the purposes of Section 614(h) of the Act. Because we find that KVMD is not local for mandatory carriage purposes, its must carry complaint is dismissed as moot.

⁴⁵See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

⁴⁶ See Altrio Petition at 14.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the must carry complaint filed by KVMD Licensee Co., LLC against Altrio Communications **IS DISMISSED**.

19. **IT IS FURTHER ORDERED** that the petition for special relief to modify the television market of Station KVMD-DT filed by Altrio Communications **IS GRANTED**.

20. These actions are taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁷

FEDERAL COMMUNICATIONS COMMISSION

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⁴⁷ 47 C.F.R. § 0.283.